

STATE OF MICHIGAN
COURT OF APPEALS

RYAN ROSETT,

Plaintiff-Appellant,

v

DAVID TREPECK,

Defendant-Appellee.

UNPUBLISHED

June 20, 2006

No. 258531

Oakland Circuit Court

LC No. 2004-058865-CZ

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). This case involves a provision within a settlement agreement between the parties. We affirm in part, and remand for further proceedings.

Plaintiff first argues that the trial court erred in concluding that the provision contained an unenforceable penalty. We review de novo whether a liquidated damages provision is invalid as a penalty provision. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998). The parties to a contract can stipulate in advance to an amount for loss or injury in the event the contract is breached. *Curran v Williams*, 352 Mich 278, 282; 89 NW2d 602 (1958). A provision is not a penalty and therefore is enforceable "if the amount is 'reasonable with relation to the possible injury suffered' and not 'unconscionable or excessive.'" *UAW-GM Human Resource Ctr, supra* at 508 (citations omitted). The stipulation is enforceable if the damages resulting from a breach are uncertain and difficult to determine at the time of execution and if it results in just compensation for the loss or injury actually sustained. *Curran, supra* at 282-283.

First, the trial court correctly noted that the settlement agreement's integration clause cancelled defendant's underlying obligation. See *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 413; 646 NW2d 170 (2002). Here, the additional \$75,000 due if plaintiff failed to make a \$25,000 payment within 30 days bears no relationship to any actual damages suffered by plaintiff. Assuming that defendant's payment was late, at most, plaintiff incurred only nominal damages presuming potential interest that he may have earned on that amount. In that regard, the parties did not calculate a reasonable amount for any possible delay in payment but instead inserted a flat rate penalty. Simply put, if plaintiff desired to settle for more money based on defendant's previous \$350,000 debt, he should have negotiated for a different amount. Thus, the

extra \$75,000 is nothing more than an unenforceable late fee. Moreover, plaintiff's attempt to distinguish the provision claiming that it is merely an incentive clause is without merit.¹

Plaintiff next argues that the trial court erred in concluding that he did not adequately plead for \$25,000 in the alternative. We review a trial court's decision concerning the scope of the pleadings for an abuse of discretion. *Smith v Stolberg*, 231 Mich App 256, 259; 586 NW2d 103 (1998). Because plaintiff prayed to have the settlement agreement enforced, the trial court abused its discretion in concluding that plaintiff did not adequately plead for \$25,000, which defendant owed under the agreement's terms. Moreover, defendant must have presumed that plaintiff was seeking \$25,000 at the very least under the agreement as defendant had already attempted to pay him this amount. Thus, we remand to the trial court for entry of judgment in favor of plaintiff in the amount of \$25,000.

Affirmed in part and remanded in part. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Stephen L. Borrello

¹ Plaintiff asserts that *Rory v Continental Ins Co*, 473 Mich 457; 703 NW 2d 23, (2005) stands for the proposition that anything contained in a contract is enforceable as long as it is unambiguous. We decline to make such a finding on our reading of the majority opinion in *Rory*, because we cannot find any language dealing with the question of liquated damages. Thus, we cannot find *Rory* applicable to the facts before us without first finding that *Rory* was intended to eliminate all prior cases dealing with the issues before us.